IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD TOBIAS	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 03-5861
	:	
PPL ELECTRIC UTILITIES CORPORATION, ET. AL.	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **January 28, 2005**

Richard Tobias claims the failure of PPL Electric Utilities to offer him an enhanced retirement package discriminated on the basis of age and violated the Employee Retirement Income Security Act.[1] PPL asks for summary judgment, arguing Tobias has not made out a *prima facie* case of age discrimination and that ERISA does not apply to the work force reduction plan. For the following reasons, we grant PPL's motion for summary judgment with respect to age discrimination but deny it on the ERISA count.

FACTS[2]

Tobias was a 59-year-old right-of-way manager who had worked for PPL for 42 years in June, 2002 when the company decided to reduce its work force by offering enhanced early retirement to selected employees under a plan entitled Operational Improvement Assessment ("Plan"). Tobias was a Right of Way Agent in the West region, to which he had been re-assigned in 1995.

[1] Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461.

[2] For the purposes of considering a motion for summary judgment, the court must review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348 (1986).

Under the Plan, the Company asked each business line to determine its staffing needs and identify the number of employees who would be offered enhanced early retirement. The Plan specifically stated there would "be no 'open' canvass for volunteers across the Company or through a business line." Plan, p. 2. If the number of persons interested exceeded the number of slots in a business line, the company offered the enhanced early retirement to the person with the most seniority.

The Plan also provided, under the heading "Program Term:"

> The Operational Improvement Assessment 2002 Separation Program is effective May 1, 2002 and expires December 31, 2002. The company reserves the right to modify, discontinue or otherwise change any portion of this program at any time and nothing contained in this program statement should be construed as a contract of employment.

Plan, p. 9.

Tobias received a personalized description of the financial benefits he would receive under the Plan. Tobias estimates the added benefits would total close to $100,000. Tobias's name was listed as a potentially affected employee in the Company's "Individualized Grouping Information" which identified one Right of Way Agent to be separated. A revised version of the same paper was published June 24, 2002 without Tobias's name. On June 19, 2002, Tobias's supervisor told him a younger Right of Way Agent with fewer years with the Company had accepted the separation offer. Two days later, Tobias received an e-mail on June 21, 2002, entitled "Additional Information for Canvassed Employees Age 55 and Over."

The Company now claims including Tobias's name in the Individualized Grouping was a "typographical" error and that, in fact, the Company never meant to canvass Right of Way Agents generally but always intended to consider the East and West regions separately. In the West region, Tobias's region, the work force was reduced by separating an independent contractor. The Right of

Way Agent canvassed in the East Region, Barrie R. Perilla, is a year and two weeks younger than Tobias and had six fewer years with the Company.

Tobias filed an appeal from the failure to include him in the Plan. On July 11, 2002, the Company told Tobias his appeal was denied because the Company "decided not to canvass all Right of Way Agents in order to avoid the risk of having to unnecessarily relocate employees to meet staffing requirements." Letter from Ron Schwarz, July 11, 2002. Tobias retired in April, 2003 without enhanced benefits. Although the Plan was designed to expire December 31, 2002, Tobias has identified two employees who received enhanced early retirement under the Plan in 2003. Tobias received a Right to Sue letter from the Equal Employment Opportunity Commission and filed this suit.

DISCUSSION

A motion for summary judgment will only be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.Rule 56(c). In a motion for summary judgment, the moving party bears the burden of proving no genuine issue of material fact is in dispute and the court must review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348 (1986). Once the moving party has carried its initial burden, the nonmoving party must then "come forward with specific facts showing there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587 (citing Fed.R.Civ.P. 56(e)). A motion for summary judgment will not be denied because of the mere existence of some evidence in support of the nonmoving party. The nonmoving party must present sufficient evidence for a fact-finder to reasonably find for them on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505 (1986). For the purposes of summary judgment, we view the evidence in the light most

favorable to the nonmoving party, in this case Tobias. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 77 (3d Cir. 2003).

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, makes it unlawful to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To prove a violation of the ADEA, a plaintiff must show his or her age "actually motivated" and "had a determinative influence on" the employer's decision. *Fakete v. Aetna, Inc.*, 308 F.3d 335, 337 (3d Cir. 2002).

Under the burden-shifting analysis established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973),[3] to survive summary judgment a plaintiff must first prove a *prima facie* case of discrimination. The *prima facie* case requires proof the plaintiff was 40 years of age or older, 29 U.S.C. § 631(a), the plaintiff was denied a benefit for which he was otherwise qualified and the benefit was given to a sufficiently younger person. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997) (en banc). The *prima facie* case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ." *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). In the age-discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13, 116 S.Ct. 1307, 1310 (1996).

When, as here, a plaintiff alleges that he has suffered age discrimination predicated on

[3] Although *McDonnell Douglas* arose under Title VII, its general framework applies to cases arising under other discrimination statutes, including the ADEA. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir.1997) (en banc).

disparate treatment, liability under the ADEA depends on whether age "actually motivated the employer's decision." *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993); *see also Monaco v. American General Assur. Co.*, 359 F.3d 296, 300 (3d Cir. 2004). The question becomes "is the employer ... treating some people less favorably than others because of their [age]." *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir. 1995) (citations omitted). Usually, disparate treatment involves an ad-hoc decision to treat an individual adversely because he or she is in a particular protected class. *Id.*

In the context of a reduction in force, to satisfy the fourth element of a *prima facie* case under the ADEA, a plaintiff must show the employer benefitted a sufficiently younger similarly situated employee. *Anderson v. Consol. Rail Corp.,* 297 F.3d 242, 249-50 (3d Cir. 2002). To satisfy the sufficiently younger standard, "there is no particular age difference that must be shown, but while different courts have held . . . a five year difference can be sufficient, . . . a one year difference cannot." *Monaco*, 359 F.3d at 307 (citations omitted).

Tobias's claim, even read in the light most favorable to him, does not survive a motion for summary judgment. Tobias meets three of the four elements of the *prima facie* case: he is older than 40, he was denied a benefit, for which he was otherwise qualified. Tobias has not alleged a fact sufficient to satisfy the fourth prong, that the benefit was given to a person sufficiently younger. The PPL Right of Way Agent who received enhanced early retirement is one year and two weeks younger than Tobias, an insufficient difference under *Monaco*. 359 F.3d at 307. Nor has Tobias educed any evidence which satisfies the underlying requirement of the ADEA, that his age "actually motivated" and "had a determinative influence on" the employer's decision. *Fakete,* 308 F.3d at 337. Therefore, we will grant PPL's motion for summary judgment on the ADEA and the PHRA claims, Counts I and III.

Tobias also alleges that the failure to provide him with enhanced early retirement violates ERISA § 502, 29 U.S.C. § 1132. Preliminarily, PPL argues the Plan is not subject to the strictures of ERISA. It is, however, clear that the Plan is an employee benefit plan under the definitions in 29 U.S.C. § 1002.[4]

A company which administers its own plan wears two hats: that of employer and that of fiduciary. As an employer, a company is free to act in its own best interests in the design of an early retirement plan. As an employer, a company may design a plan which reserves the right to determine that the early retirement of certain employees was not in its best interest. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918-19 (3d Cir.1990). However, when the employer is *administering* the plan and paying out benefits, it acts as a fiduciary and must act in the interest of the plan's participants. ERISA § 404, 29 U.S.C. § 1104 (establishing fiduciary standards under ERISA); *Noorily v. Thomas & Betts Corp.*, 188 F.3d 153, 158 (3d Cir. 1999).

An employer acts as a fiduciary when administering a plan but not when designing or making business decisions allowed for by a plan, even though in all three situations its determinations may impact its employees. *Noorily*, 188 F.3d at 158. An employer can create a plan that furthers its business interests, and it can act according to these interests in amending or terminating the plan. *Id.* To the degree that the plan gives an employer discretion, the employer is not a fiduciary when it makes determinations according to the plan's terms that affect employees' eligibility for benefits.

---

[4] 29 U.S.C. § 1002, in relevant part:

> **(2)(A)** Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--
>
> **(i)** provides retirement income to employees . . . .

Berger, 911 F.2d at 918. There is nothing wrong under ERISA with a system that gives plan administrators discretion. Subject to a few explicit rules in the statute, an employer may design a pension or welfare plan with features of its choosing, provided it is willing to pay the cost. *McNab v. General Motors Corp*., 162 F.3d 959, 961 (7th Cir. 1998). ERISA permits discretionary plans. *Id.* at 962.

The award of benefits under an early retirement plan is determined by the plan's design. The degree of flexibility in administering the plan is determined by the plan's language. The plan in *Air Jamaica*, for instance, reserved the right to determine benefits on a case-by-case basis. *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3d Cir. 1991). The *Air Jamaica* plan provided:

> Although it is our present intention to continue these pay practices, employment policies and benefits, we reserve the right, whether in an individual case or more generally, to alter, reduce or eliminate any pay practice, policy or benefit, in whole or in part, without notice. Moreover, personnel actions taken or decisions made will not necessarily be reversed or modified if these policies or procedures are not followed.

Id. at 76. The Third Circuit held "nothing in ERISA prevents Air Jamaica from providing its employees with benefits on a case by case basis – as long as that limitation is explicitly stated as part of the plan." *Id.* at 78.

Similarly, the Third Circuit held nothing in ERISA prevents an employer from limiting early retirement benefits to plants which it determined were overstaffed. *Trenton v. Scott Paper Co.*, 832 F.2d 806, 810 (3d Cir. 1987). The Third Circuit also approved a plan which reserved the right to grant early retirement benefits "so long as the company deems such retirement to be in its interest." *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988). The Bethlehem Steel plan provided:

> who considers that it would be in his Employing Company's interest to retire, and his Employing Company considers that such retirement would likewise be in its interest

> and approves an application for retirement under mutually satisfactory conditions, shall be eligible to retire . . . , and shall upon his retirement . . . be eligible for a pension. . . .

Id. at 280. The court held "[t]he broad grant of discretion provided by . . . [the] plan is not prohibited by ERISA." *Id.* at 283. The Third Circuit also affirmed the individualized application of a plan which provided an employee "who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions." *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 914 (3d Cir. 1990). In *Berger,* the court held "only the employer determines whether an employee's retirement is in the company's best interest. Neither the plan administrator nor the pension board have the authority to override the company's business decision." *Id.* at 918.

While ERISA permits discretionary plans, it does not permit discretionary administration of the plan. Once a plan is established, the administrator is obliged to administer the plan "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C.A. § 1104.

Tobias's case is distinguishable from the case law which PPL cites in support of its motion for summary judgment because the plan provision granting the company discretion does not reserve the right to make individualized decisions regarding the grant of enhanced early retirement. The general language in this case, "[t]he company reserves the right to modify, discontinue or otherwise change any portion of this program at any time," does not purport to reserve the right to pick and choose among employees to whom the benefit would be offered. The PPL language varies greatly from that found in the cited cases which reserved the rights to make individual decisions: "in an individual case," *Air Jamaica, Ltd.*, 945 F.2d at 76; "such retirement," *Hlinka*, 863 F.2d at 283; "such retirement . . . an application." *Berger*, 911 F.2d at 914.

The differences in the reservation of discretion is sufficient to allow Tobias's claim to survive PPL's motion for summary judgment. The questions of whether PPL offered and rescinded early retirement or merely made a typographical error, and whether offer and rescission, if proved, constitute a violation of ERISA remain for trial.

Accordingly, we enter the following:

ORDER

And now this 28th day of January, 2005, Defendant's Motion for Summary Judgment (Document 20) is GRANTED in part and DENIED in part. Plaintiff's Demand for a Jury Trial is stricken and a bench trial is scheduled for 9:00 a.m., February 8, 2005, in the Reading Station of the Eastern District Court, 400 Washington St., Reading, PA, Courtroom 4.

BY THE COURT:

\s\ Juan R.Sánchez
Juan R. Sánchez, J.